STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	**)**
	)
ELPHEGE VIETTE,	**)**
	)
Complainant,	**)**
	)
and	**)Charge No: 2000CA0124**
	)EEOC No: 21 BA 12974
	)ALS No: 11955
CLARION BARCELLO HOTEL,	**)**
	)
Respondent.	**)**

RECOMMENDED ORDER AND DECISION

This matter is before me on Respondent's Motion for Summary Decision. Respondent filed a memorandum along with exhibits and affidavits on August 15, 2003. Complainant filed a response memorandum along with affidavits and exhibits on September 22, 2003 and Respondent filed a reply memorandum on October 15, 2003. The record indicates the motion has been properly served upon all Parties and the Illinois Department of Human Rights.

CONTENTIONS OF THE PARTIES

Complainant contends that he was the victim of race and age discrimination when he was suspended and then discharged by Respondent. Respondent contends that the reason for Complainant's suspension and discharge was unrelated to his race and age.

The following discussion includes facts that were derived from uncontested pleadings, affidavits and other documentation in the record in accordance with standards applicable to motions for summary decision, which require that all factual conflicts in the record be viewed in the light most favorable to the non-moving party.

CONCLUSIONS OF LAW

1. Complainant is an "aggrieved party" as defined by section 1-103(B) of the Illinois Human Rights Act, 775 ILCS 5/1-101 et. seq. (Act).
2. Respondent is an "employer" as defined by section 2-101(B)(1)(a) of the Act and is subject to the provisions of the Act.
3. Complainant cannot establish a prima-facie case of age or race discrimination.
4. Respondent articulated a legitimate, non-discriminatory reason for its adverse action against Complainant.
5. There are no genuine issues of material fact as to Complainant's prima facie showing or as to the issue of pretext.
6. Respondent is entitled to a recommended order in its favor as a matter of law.

DISCUSSION

Complainant filed a Charge of discrimination against the Respondent with the Illinois Department of Human Rights (Department) on July 23, 2001. The Department filed a Complaint on behalf of the Complainant with the Illinois Human Rights Commission on December 4, 2002, alleging Complainant to have been aggrieved by practices of age and race discrimination in violation of the Illinois Human Rights Act (Act), 775 ILCS 5/1-101 *et. seq*.

This matter is being considered pursuant to Respondent's Motion for Summary Decision. A summary decision is analogous to a summary judgment in the Circuit Court. **Cano v. Village of Dolton**, 250 Ill.App.3d 130, 620 N.E.2d 1200 (1st Dist. 1993). A motion for summary decision should be granted when there is no genuine issue of material fact and the moving party is entitled to a recommended order in its favor as a matter of law. **Strunin and Marshall Field & Co.**, 8 Ill. HRC Rep. 199 (1983). The movant's affidavits should be strictly construed, while those of the opponent should be liberally construed. **Kolakowski v. Voris**, 76 Ill.App.3d 453, 395 N.E.2d 6 (1st Dist.

1979). The movant's right to summary decision must be clear and free from doubt. **Bennett v. Ragg**, 103 Ill.App.3d 321, 431 N.E.2d 48 (2nd Dist. 1982).

Complainant's Complaint alleges that he discriminated against based on his race and age when he was suspended and then discharged. Since there is no evidence of discrimination by direct means in the record, Complainant must prove his case through indirect means. The method of doing so is well established. First, Complainant must establish a prima facie showing of discrimination. Once he has done so, Respondent must articulate a legitimate, non-discriminatory reason for its adverse action. After this articulation, Complainant must then prove that Respondent's articulation is pretextual. **Zaderaka v. Human Rights Commission**, 131 Ill.2d 172, 545 N.E.2d 684 (1989); **Texas Department of Community Affairs v. Burdine**, 450 U.S. 251 (1981).

The prima facie cases for race and age discrimination in this case are similar. In order to establish a prima facie showing of race and age discrimination, Complainant must prove: 1) that he is in a protected class; 2) that he was meeting the Respondent's legitimate expectations; 3) that he was subjected to adverse treatment by Respondent; and 4) that similarly situated employees outside his protected class were treated more favorably under similar circumstances. **Mayhew v. Illinois Department of Public Aid**, __ Ill. HRC Rep. __, (1989CA0260 May 28, 1996); **Sheffield and Wilson Sporting Goods Co.**, __ Ill. HRC Rep. __, (1990CF1450, May 7, 1993); **Clyde v. Illinois Human Rights Commission**, 206 Ill. App. 3d 283, 564 N.E. 2d 263 (1990). Once Complainant makes a prima facie showing, an inference of discrimination is created and the employer must then articulate a legitimate, non-discriminatory reason for its difference in treatment between the Complainant and the similarly situated employees outside of the protected class. **McDonnell-Douglas Corp v. Green**, 411 U.S. 792 (1973).

Complainant has demonstrated the first three elements of his prima facie showing, as it is undisputed that Complainant belongs to the two protected classes: his

race is black and his age is 40; it is undisputed that he was meeting the employer's legitimate expectations; it is further undisputed that he was subject to adverse employment actions when he was suspended and subsequently discharged from his job.

Respondent argues that Complainant cannot prove the fourth element of his prima facie showing, nor can he prove that Respondent's proffered reason was a pretext for race or age discrimination. Respondent contends that Complainant's submitted comparables are not similarly situated to Complainant because their infractions were not as serious as Complainant's and therefore did not warrant as serious a punishment.

However, the Commission has held that when the Respondent has put forward evidence as to its articulation, the *prima facie* case is no longer at issue and Complainant must then show Respondent's proffered reason to be pretext. **Froelich and Fisher Scientific,** 33 Ill HRC Rep. 307 (1987); **Sehr and Electronic Support Systems, Corp**, __ Ill. HRC Rep. __ (1985CF0725, December 20, 1990). Since, in this case, Complainant's demonstration of the fourth element of his prima facie showing and his demonstration of pretext are nearly identical, I will simply discuss the pretext analysis.

One method of a successful pretextual showing is to demonstrate that employees involved in misconduct of comparable seriousness were not suspended or discharged as Complainant. An employer may justifiably discipline employees who fall afoul of the rules, but only if the disciplinary criteria are applied alike to all races. An employer cannot retain guilty employees of one color, while firing guilty employees of another color. **Loyola University of Chicago v. Illinois Human Rights Commission** 149 Ill. App. 3d 8, 500 N.E. 2d 639 (1st Dist. 1986). However, disciplining employees in a different manner is probative of discrimination only if the other employees were situated similarly to Complainant. **Loyola**, *supra,* 149 Ill App 3d 8 at 19, citing

Donaldson v. Taylor Products. Div. of Tecumseh Products Co., 620 f.2d 155, (7th Cir. 1980).

The undisputed facts in the record show that Complainant and Carlos Arroyo (Arroyo), who is Hispanic and 28 years old, were both shuttle drivers for Respondent and were assigned the same driving route. Respondent hotel provides shuttle bus services to and from O'Hare airport and operates two shuttles with overlapping shifts of shuttle drivers. Complainant worked the night shift from 11:00 p.m. to 7:00 a.m. and Arroyo worked the morning shift from 4:45 a.m. to 12:45 p.m. Complainant and Arroyo were involved in an argument on the job site on June 14, 2001. Arroyo called the police department that morning and filed a police report of the incident, accusing Complainant of having hit him during the argument. The criminal complaint brought as a result of the police report was later dismissed by the court.

At the time of the argument, Arroyo and Complainant reported to Assistant General Manager Jim Anderson (Anderson); and Anderson reported to General Manager Atilla Zobor (Zobor). Anderson received a telephone call at home on the morning of June 14, 2001, informing him that police were at the hotel. When Anderson arrived, he learned that Complainant and Arroyo had been in an argument. Anderson had a meeting with Complainant, Arroyo, and Zobor to discuss the incident. During this meeting, Arroyo maintained that Complainant had hit him during the argument. Although Complainant admitted the two had been involved in an argument, Complainant denied that he had hit Arroyo. Complainant made no accusations that Arroyo had hit him.

Anderson submits an affidavit averring that he had a meeting with Complainant, Arroyo and Zobor that morning following the incident. Later that morning, Arroyo requested a meeting with Anderson and Human Resources Manager Tracie Rasic (Rasic) where Arroyo expressed concern for his safety while working with Complainant because there was generally no supervisory staff working in the morning

when Arroyo first arrived to work. After the meeting, Anderson discussed the issue with Zobor and he, Zobor and Rasic had a meeting about the incident. The three decided to suspend Complainant pending an investigation because they believed Arroyo's accounting of the incident was more truthful than Complainant's denial. Respondent did not suspend Arroyo because there had been no allegations from Complainant that Arroyo had hit him.

Later that morning, Anderson and Rasic interviewed two other employees about the incident. Anderson then discussed the incident with Rasic and Zobor and the three unanimously decided to discharge Complainant because they believed Arroyo's version of the accusations that Complainant had hit him. Rasic submits an affidavit averring that the Hotel's Rules and Regulations state that "physical harassment or assault on co-workers or guests" violates the Hotel's "standards of conduct and will justify disciplinary action, up to and including termination." Rasic further avers that after she and Anderson interviewed the two other employees about the incident, she then discussed the incident with Anderson and Zobor and the three unanimously decided to discharge Complainant for hitting Arroyo in violation of Respondent's rules. Complainant was discharged on June 18, 2001.

In order to demonstrate that he was treated more harshly than similarly situated employees, Complainant contends Joshua Taboado (non-black, age 26) is a similarly situated employee who engaged in similar conduct as Complainant, but was counseled and not discharged. This argument fails, as Taboado was not accused of hitting anyone. Instead Toboado's disciplinary infractions included leaving work early without authorization, failing to complete his assigned shuttle runs, failing to pick up guests in a timely manner, and cursing at a co-worker. Complainant also offers Baez Valentin (non-black, age 27) as a similarly situated employee who was not discharged for similar infractions; however, Valentin was cited for failure to show to work, for being late, and for

gossiping to other employees. Complainant also points to Jesus Rodriguez (non-black) as a third similarly situated employee who broke the rules and was not discharged; however Rodriguez was cited for insubordination, for taking the elevator key home with him, and for failing to clean rooms and wash linen.

The Illinois Appellate Court has stated that the concern is not with the harshness of the discipline imposed but instead with whether the discipline imposed was harsher than that imposed on comparable persons of other races. **Loyola**, *supra*, 149 Ill.App. 3d 8 at 18. Complainant does not dispute the accuracy of the stated reasons each of the respective submitted comparable employees were disciplined. Further, Complainant has failed to show how his purported disciplinary infraction of hitting a co-worker is similar to the infractions of the submitted comparables. None of the infractions of the comparables involved any violence and none included any physical hitting of another co-worker. There is nothing in the conduct of Complainant's submitted comparables that is worthy of comparison with the egregiousness of the conduct for which Complainant was accused.

In the absence of evidence from Complainant, Respondent's evidence stands unrebutted and must be accepted. **Koukoulomatis v. Disco Wheels**, 127 Ill.App.3d 95, at 101, 468 N.E.2d 477 (1st Dist. 1984). Complainant submits no affidavits or other evidence contradicting the veracity of Respondent's investigation and submits no evidence to contradict that Respondent reasonably believed Arroyo's version of the events and rejected Complainant's denials. Further, Complainant does not dispute that he never made any accusations that Arroyo had also hit him.

Thus, Complainant fails to raise a genuine issue of material fact on the issues of whether his submitted comparables are indeed similarly situated and as to whether Respondent's proffered reasons for suspending and then discharging him were pretextual.

As there are no issues of material fact as to Complainant's showing of a prima facie case or as to whether Respondent's decision to discharge Complainant was pretextual, Respondent's motion for summary decision must be granted. Accordingly, all previously scheduled hearing dates are stricken.

RECOMMENDATION

For all the above reasons, it is recommended that the Complaint and the underlying Charge of Discrimination be dismissed with prejudice.

HUMAN RIGHTS COMMISSION

By:_____
SABRINA M. PATCH
Administrative Law Judge
Administrative Law Section

ENTERED: December 22, 2003